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UNITED NATIONS CONFERENCE ON THE LIABILITY OF OPERATORS OF
TRANSPORT TERMINALS IN INTERNATIONAL TRADE

FIRST COMMITTEE

SUMMARY RECORD OF THE 11th MEETING

Held at the Austria Center Vienna,
on Wednesday, 10 April 1991, at 9.30 a.m.

Chairman: Mr. BERAUDO (France)

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The meeting was called to order at 9.45 a.m.

CONSIDERATION OF ARTICLES 1 TO 16 AND 20 OF THE DRAFT CONVENTION ON THE LIABILITY OF OPERATORS OF TRANSPORT TERMINALS IN INTERNATIONAL TRADE (agenda item 3) (continued) (A/CONF.152/5, 6, 7 and Add.1 and Add.1/Corr.1 and Add.2)

Article 4 (continued) (A/CONF.152/C.1/L.43)

1. Mr. INGRAM (United Kingdom), introducing his delegation's proposal (A/CONF.152/C.1/L.43), said that it represented a recasting of its earlier proposal for a new article (A/CONF.152/C.1/L.31), which had already been discussed. Its main purpose was to enable the carrier or other person having an interest in goods placed in charge of an operator to be sure that it was clear from the documentation that the goods he was entrusting to him were goods to which the Convention applied.
2. Under paragraph (1) of the proposal, the carrier could request the operator to confirm three points. The only new element was confirmation that the goods were in international carriage. Paragraph (2) stated what the operator must do on receipt of such a request. Both parties would then be aware that the Convention applied to the goods in question. Paragraph (3) indicated what would happen if the carrier failed to make the request in question. Paragraph (4) set out the consequences of the document that indicated that the goods were involved in international carriage.
3. The changes his delegation was suggesting were not as great as they might appear and were designed to show clearly when the Convention applied.
4. Mr. RUSTAND (Sweden) thought that the idea underlying the United Kingdom proposal could be dealt with more simply by making minor amendments to article 4 (1) (a) and (b), specifying that the goods should be identified as being involved in international carriage.
5. Mr. TARKO (Austria), referring to the words "A carrier or other person having an interest in goods" in paragraph (1), pointed out that the Convention dealt with the duties of an operator and not those of a carrier or other persons. He wondered why paragraph (1) apparently called for three documents, whereas paragraph (2) only provided for two. With respect to paragraph (4), he would like to know the exact meaning of the term "absolute confirmation", since the paragraph as drafted would cause problems in his country. The proposal was similar to the existing text, which should be kept as already amended.
6. Ms. SKOVBY (Denmark) asked why the presumption in paragraph (5) of the proposal was only that the goods had been received in good condition, and not also that they were in international carriage.
7. Mr. INGRAM (United Kingdom) said that he was more concerned with the principle behind his delegation's proposal than the drafting. It might, as the Swedish representative had suggested, be possible to provide for the intended result by amending the existing text of article 4.
8. Referring to the comments by the Austrian representative, he said that the reference to carrier or other person was designed to spell out the meaning of the word "customer" and that the text did not create any new obligation for the carrier or other person. Paragraph (1) did not provide for any new document; there were still only two, as indicated in paragraph (2). The words "absolute confirmation" meant that the presumption was not rebuttable.

(Mr. Ingram, United Kingdom)

9. As to the point raised by the representative of Denmark, he said that the question of the goods being involved in international carriage was dealt with in paragraph (4).

10. Mr. ROJANAPHRUK (Thailand), referring to paragraph (1) of the United Kingdom proposal, thought that the expression "goods which he has placed" should be amended to read "goods which have been placed".

11. Mr. ABASCAL (Mexico) said that the introduction of a new element which would require the operator to acknowledge that the goods were involved in international carriage could give rise to certain problems. He would like to know what would happen if an operator who had reasonable doubts as to whether the goods were involved in international carriage refused to sign the document because of those doubts.

12. Mr. MORAN (Spain) said that article 1 (c) gave a clear definition of the term "international carriage" as carriage in which the place of departure and the place of destination were located in two different States. To provide for the operator to acknowledge the fact that goods were in international carriage would be to introduce a subjective aspect, since the operator could do so on a unilateral basis. If the United Kingdom wished to press its proposal, the most appropriate solution might be to amend article 1 (c).

13. Mr. RUSTAND (Sweden) thought that the Committee should vote on the proposal and that the Drafting Committee should then be requested to prepare an appropriate text.

14. Mr. LEBEDEV (Union of Soviet Socialist Republics) thought that it might be difficult to reject a text that had already been adopted by the Committee and to replace it by the new text proposed by the United Kingdom. However, some of the elements of the proposal might be taken into account by the Drafting Committee. One of those points was to be found in paragraph (2) of the United Kingdom proposal, which gave a clear indication of when the reasonable period of time began, namely, on receipt of a request made under paragraph (1).

15. Mr. ZHAO Chengbi (China) said that article 2 showed clearly that the Convention covered goods involved in international trade. The provisions of the Convention were all designed within that general framework. Since the United Kingdom proposal provided for acknowledgement that goods were involved in international carriage, his delegation considered it to be necessary.

16. The CHAIRMAN invited the Committee to vote on the United Kingdom proposal (A/CONF.152/C.1/L.43).

17. The proposal was rejected by 27 votes to 3, with 2 abstentions.

Article 1, proposals for new subparagraphs (continued) (A/CONF.152/C.1/L.37)

18. The CHAIRMAN said he understood that an earlier proposal by the United Kingdom for the addition of a definition of "person" in article 1 (A/CONF.152/C.1/L.37) was related to the proposal that had just been rejected. He asked the United Kingdom representative if he still wished to have that proposal discussed.

19. Mr. INGRAM (United Kingdom) said his proposal for article 1 did not bear any particular relation to his proposal for article 4. The word "person" was used throughout the Convention, and his delegation believed it would be useful to define it.

20. Mr. BONELL (Italy) said that he could not support the proposal, which would introduce unnecessary complications into the Convention. The concept of "person" was understood differently in different legal systems, and if one particular definition was adopted, there would be great difficulty in finding exact equivalents in other languages.

21. Mr. OCHIAI (Japan) shared that view. Under Japanese law, a partnership or private body which was not incorporated was not a person in the legal sense, and the definition would therefore cause legal difficulties. In addition, the definition should not include States, because of the concept of national immunity.

22. Mr. INGRAM (United Kingdom) said there was in fact a long-standing precedent for the definition proposed: its wording had been taken from the 1969 Convention on Civil Liability for Oil Pollution Damage. In many cases, operators were port authorities, which were public bodies, and it was important to make clear in the definitions that such bodies were covered by the Convention.

23. Mr. GOKKAYA (Turkey) agreed that it was important to make clear that the word "person" covered not only individuals but public bodies: in his country, transport terminals were normally run by State-controlled companies. However, he suggested that a more appropriate formulation might be the one used in article 1 of the Convention on the Limitation Period in the International Sale of Goods, where "person" was defined as including any corporation, company, partnership, association or entity, whether public or private, which could sue or be sued.

24. The CHAIRMAN invited the Committee to vote on the United Kingdom proposal (A/CONF.152/C.1/L.37).

25. The proposal was rejected by 24 votes to 5, with 4 abstentions.

Article 7 (A/CONF.152/C.1/L.14)

26. Ms. ZAWITOSKI (United States of America) said that the discussions that had already taken place in the Committee on the subject of aggregate liability had met her delegation's concern regarding article 7 (3). It would therefore withdraw its proposal (A/CONF.152/C.1/L.14).

27. Article 7 was approved.

Article 8 (A/CONF.152/C.1/L.3, L.25)

28. Miss VAN DER HORST (Netherlands), introducing her delegation's proposal (A/CONF.152/C.1/L.25), said her Government had serious objections to the inclusion of agents and servants in paragraph (1) of article 8. In order to exercise his profession, an operator needed to be able to assess the risks involved and to insure against them. If the limit on the operator's liability could easily be broken, the whole concept of limitation would become illusory, since operators would still have to insure themselves for the full amount of damages. Increased risk for the operator would inevitably be reflected in increased charges by insurers. In any event, the party interested in the goods would normally have taken out transport insurance to cover the goods through the entire transport process. Limits of liability should be broken only in exceptional cases, if the value and significance of those limits were not to be reduced.

29. Deletion of the words "himself or his servants or agents" in paragraph (1) would mean that the operator would not lose entitlement to limitation of liability unless the act leading to the loss or damage could be attributed to him personally

(Miss van der Horst, Netherlands)

or, where the operator was in fact a corporation, to a person acting at managerial level in that corporation. That would be in line with article 8 of the Hamburg Rules and with article 21 of the Multimodal Convention. Her delegation's proposal was all the more necessary in view of the fact that, under article 8, limitation would not be applicable if the operator's servants or agents were acting outside the scope of their employment.

30. She pointed out that the comments made by the International Maritime Committee on article 8 (A/CONF.152/7/Add.2, p. 6) were in line with her delegation's views on the matter.

31. Mr. TARKO (Austria) could not support the proposal. The principle of unlimited liability for acts or omissions committed with intent or with recklessness was already accepted in many States, and it was only right that the operator should be fully liable for such acts. It was also generally known that in many cases the operator was not a physical person but a legal entity - including a State, or a subdivision of a State. It was hardly likely that acts resulting in loss or damage would be committed by such entities themselves; they were more likely to be committed by the operator's servants or agents, who were actually dealing with the goods. According to the principle of culpa in eligendo, the operator had a duty to choose suitable persons as his servants or agents, and he should be liable without limitation for any acts or omissions on their part. There were thus good reasons why the existing text of paragraph (1) should be kept.

32. Mr. INGRAM (United Kingdom) regarded the amendment proposed by the Netherlands as the most crucial of all those that had been put forward. Article 8 as now drafted was the provision which had caused the greatest alarm to all the commercial interests that his delegation had consulted. It was vital that liability should be insurable and that it should have reasonable limits. A provision which would remove all limits in the case of acts or omissions by servants or agents would have disastrous implications for insurance, and he would urge that the Netherlands proposal be adopted.

33. Mr. FILIPOVIĆ (Yugoslavia) pointed out that the limits of liability set in the draft Convention were in fact very low: as he saw it, low limits were not compatible with the principle of unbreakability. He was therefore opposed to the proposal.

34. Mr. CHRISTOV (Bulgaria) said that he too was unable to support the proposal.

35. Ms. SKOVBY (Denmark) urged the Committee to consider carefully the implications of excluding from the article acts or omissions committed by servants or agents. In a recent case in her country, the chief security officer at the Scandinavian Airlines System cargo centre had been accused of misappropriating a sum equivalent to AS 100 million over a period of five years.

36. Mr. BRUNN (International Union of Marine Insurance), speaking at the invitation of the Chairman, supported the Netherlands proposal, and endorsed the arguments advanced by the United Kingdom representative. It would be very expensive, if not impossible, for an operator to obtain insurance cover for unlimited liability for fraud committed by his servants or agents. The principle of breakability was justified if the operator himself acted fraudulently, but that principle should not be applied to acts committed by servants or agents. He pointed out that the increased cost of insurance cover for such liability would ultimately be borne by the consumer and would thus have economically disastrous repercussions.

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37. Mr. SWEENEY (United States of America) also opposed the proposal. In practice, it would be very difficult to prove that the persons concerned had acted with intent, recklessly, or with knowledge that loss or damage would probably result. Breaking liability limitations was justified only in extreme cases, where the very existence of an enterprise was at risk. In any event, servants or agents of the operator employed in sensitive areas, such as in the handling of jewellery or currency, would normally be bonded. He saw no need for the proposed deletion.

38. Mr. BONELL (Italy) said he too opposed the proposal. In modern commerce, it was most unlikely that any acts resulting in damage would be committed by the operator himself; normally, it would be the behaviour of his servants or agents that would be at stake.

39. The CHAIRMAN invited the Committee to vote on the Netherlands proposal (A/CONF.152/C.1/L.25).

40. The proposal was rejected by 21 votes to 8, with 4 abstentions.

41. Mr. SCHROCK (Germany), introducing the proposal contained in the second paragraph of document A/CONF.152/C.1/L.3, said that the same proposal had been made during the preparatory work on the draft Convention and stood halfway between the Commission's text and the proposal just voted upon by the Committee. In addition to the two models referred to in the third paragraph of the document, he also wished to mention article 7 (2) of the draft under consideration, as adopted by the Committee, which also included a reference to the scope of employment, a concept well known in many jurisdictions.

42. The proposal contained in the first paragraph of document A/CONF.152/C.1/L.3 was withdrawn in view of the rejection of the proposal in document A/CONF.152/C.1/L.25.

43. Mr. SERVIGON (Philippines) said that in his country's legal system, the concept of intent included the knowledge that loss, damage or delay would probably result from an act or omission. His delegation would therefore prefer paragraphs (1) and (2) of article 8 to end with the word "recklessly", the remainder of the text of both paragraphs being omitted.

44. The CHAIRMAN said that the interpretation just given by the Philippine representative was not universally accepted; moreover, the expression in question appeared in a large number of international conventions and could not be dropped without the risk of an a contrario interpretation of the provisions of those instruments.

45. Mr. RUSTAND (Sweden) said that he supported the proposal and endorsed the introductory remarks made by the German representative. A similar provision also appeared in article 10 of the Convention on Civil Liability for Damage Caused During Carriage of Dangerous Goods by Road, Rail and Inland Navigation Vessels (CRTD) adopted at Geneva in 1989.

46. Ms. SKOVBY (Denmark) said that she also supported the German proposal, which coincided with the interpretation adopted in her country. Raising a further point in connection with article 8, she asked whether the absence of a reference to "other persons" in paragraph (1) was due to an oversight; such a reference appeared twice in paragraph (2).

47. The CHAIRMAN said that the omission was deliberate and represented a compromise solution adopted following lengthy discussions during the preparatory work on the draft.

48. Mr. FALVEY (United States of America) said that when the issue raised in the German proposal had been discussed in the Commission, his delegation had made the point that if an act done with intent to cause loss, damage or delay was performed within the scope of the employment of the person committing the act, then it was the operator himself, as that person's employer, who was responsible. He could not support the German proposal.

49. Mr. FILIPOVIĆ (Yugoslavia) said that if the proposal were adopted, the burden of proof would be so heavy that the operator would, in effect, never lose the right to the benefit of the limitation of liability in a case of loss, damage or delay resulting from an act or omission by his servants or agents. He, too, was unable to support the proposal.

50. Mr. LEBEDEV (Union of Soviet Socialist Republics) said that a distinction had to be drawn between transport conventions and a convention dealing with transport terminals; to invoke the provisions of certain transport conventions was not necessarily convincing in the present context. Referring to the question raised by the Danish representative, he said that although the question of intentionally harmful or reckless acts or omissions by other persons of whose services the operator made use for the performance of the transport-related services was not expressly settled in the Convention, it would be incorrect to conclude that such acts or omissions could not lead to the operator's loss of his right to the benefit of the limitation of liability. The question had to be settled in each separate case on the basis of the applicable national law.

51. The CHAIRMAN invited the Committee to vote on the proposal by Germany in the second paragraph of document A/CONF.152/C.1/L.3.

52. The proposal was rejected by 22 votes to 10, with 3 abstentions.

53. The CHAIRMAN said that, in the absence of further proposals on article 8, he would take it that the article had been adopted.

54. It was so decided.

Article 9 (A/CONF.152/C.1/L.40, L.55)

55. Mr. ROMAN (Belgium), introducing his delegation's proposal on article 9 (A/CONF.152/C.1/L.40), said that the passage whose deletion was being proposed placed a very heavy burden of proof upon the operator. Moreover, the concept of negative proof was unfamiliar in his legal system, as in many others.

56. Mr. BONELL (Italy) said that, as he understood the provision in the chapeau of article 9, negative proof was not required; what had to be proved was the operator's actual knowledge of the goods' dangerous character.

57. Mr. HORNBY (Canada) concurred with that interpretation. While sympathizing with the Belgian delegation's concern, he considered the present text to be satisfactory.

58. The CHAIRMAN wondered whether the meaning of the provision might not be made clearer if the words "and if" were replaced by the words "or if".

59. Mrs. PIAGGI DE VANOSS (Argentina) said that the text would be much clearer if the negative language at present employed ("... does not otherwise know ...") were replaced by a positive formulation.
60. The CHAIRMAN thought that the point just raised, as well as his own suggestion, might be referred to the Drafting Committee.
61. Mr. OCHIAI (Japan) expressed support for the draft in its present form. Article 13 (2) of the Hamburg Rules, which had served as the model for article 9, contained the expression "and ... does not otherwise have knowledge of their dangerous character".
62. Mr. ZHAO Chengbi (China) said that he also preferred the existing text, which was equally fair to both the operator and the customer. It should not be forgotten that the storage and transport of dangerous goods involved many issues and could affect many persons other than the operator or the customer; it was quite natural, therefore, that special requirements should be addressed to both.
63. Mr. BONELL (Italy), with reference to the drafting amendment suggested by the Chairman, felt that it would be difficult to substitute "or" for "and" in the fourth line of article 9, since, in his understanding, the text was intended to stipulate when the operator was entitled to take extraordinary measures. If the dangerous goods were not marked, labelled, packaged or documented in accordance with any law or regulation relating to dangerous goods applicable in the country where the goods were handed over, an additional condition was laid down, namely, that the operator did not otherwise know of their dangerous character. In consequence "and" was needed rather than "or".
64. As for the suggestion by the representative of Argentina that the article should be formulated in positive rather than negative terms, he agreed that such an approach would make for a clearer and more straightforward provision. Indeed, such a positive formulation had been employed in the early stages of discussion several years before, when the text had stated that the customer must label or otherwise inform the operator in the case of dangerous goods, but the Working Group had changed to the present approach because the Convention dealt with the liability of the operator of a transport terminal and not with any contract between the operator and his customer. It had considered that the duties of the customer lay outside the scope of the Convention. The provision had therefore been shortened to deal solely with the rights of the operator and given a negative formulation. A return to the original approach of a formulation in positive terms would call for additional work that could not be left to the Drafting Committee.
65. Mr. INGRAM (United Kingdom) supported the Belgian proposal. The rights conferred on the operator were not absolute: he was entitled merely to take all precautions the circumstances might require and to be reimbursed for their cost, and it was irrelevant whether or not he knew unofficially that the goods were dangerous.
66. Mr. CHRISTOV (Bulgaria) supported the Belgian proposal.
67. Mr. RUSTAND (Sweden) expressed his full agreement with the comments made by the representative of Italy.
68. Ms. SKOVBY (Denmark) observed that article 9 constituted in fact an exception to the provisions of article 5, because if the operator took in dangerous goods without knowing that they were dangerous, he was not liable for loss or damage to

(Ms. Skovby, Denmark)

the goods resulting from the measures provided for in article 9. In her view, as she had already suggested on a previous occasion, article 9 should be placed closer to article 5. She also opposed the deletion proposed by Belgium since, in many cases, it was left by agreement to the operator to mark or label dangerous goods and the proposed deletion might give him an opportunity to disclaim responsibility. The words in question were also needed in such cases because it was of great importance to a subsequent carrier that dangerous goods be marked.

69. The CHAIRMAN invited the Committee to vote on the Belgian proposal (A/CONF.152/C.1/L.40).

70. The proposal was rejected by 29 votes to 3, with 1 abstention.

71. Ms. SISULA-TULOKAS (Finland), introducing her delegation's proposal (A/CONF.152/C.1/L.55), said that its purpose was to avoid unnecessary danger and liability situations by inserting a straightforward sentence before the first sentence of article 9 (1) to the effect that the operator must be informed of the dangerous character of the goods.

72. Mr. BONELL (Italy) said that it might be argued that the proposal stated an obligation of the customer and therefore lay outside the scope of the Convention. However, in the light of the discussion and of the points made by the representative of Belgium, he considered it worth clarifying the matter. Since the wording of the proposal avoided an explicit statement of the customer's duty, he felt able to support the amendment, especially as it would avoid possible misunderstandings with respect to the other provisions.

73. Mr. PAMBOU-TCHIVOUNDA (Gabon) expressed his support for the Finnish proposal, since it clarified a situation that had been left implicit. The original text considered only a negative possibility. The Finnish proposal had the advantage of making explicit the obligations of all parties, and especially of the customer or person who handed the goods over to the operator.

74. Ms. SKOVBY (Denmark) also supported the proposal.

75. Mr. FATHALLA (Observer, United Nations Environment Programme) also supported the proposal, which was along the same lines as provisions in several other conventions, such as article 13 (2) of the Hamburg Rules.

76. Mr. LEBEDEV (Union of Soviet Socialist Republics) said that the Finnish proposal was fully understandable and in substance not a divisive issue. However, the suggested sentence was modelled on the first sentence of article 13 (2) of the Hamburg Rules and used language that, in his opinion, was not appropriate for article 9 of the present draft Convention, which assumed that the customer would mark, label and submit documents concerning goods that were dangerous in keeping with the rules and regulations applicable in the country where the goods were to be delivered. The addition of the proposed sentence appeared to him to be inconsistent in the context of article 9 and would make it necessary to reconstruct that provision. The whole issue of the dangerous character of goods varied according to the nature of the operation concerned. The functions of the operator of a transport terminal and of a carrier were different in that respect. In his view, the present text was sufficiently flexible and therefore preferable.

77. Mr. ROJANAPHRUK (Thailand) said that although the idea behind the Finnish proposal was acceptable he did not think that such a sentence should be included in article 9, or even anywhere in the present Convention. The text was modelled on the first sentence of article 13 (2) of the Hamburg Rules, but those Rules contained a general provision on the subject. It was the task of the Conference to adopt a Convention on the liability of operators of transport terminals. The purpose of article 9 was that if the operator had not known that the goods were dangerous, he was entitled to receive reimbursement for all costs incurred by him in taking special measures with regard to them. It was thus inappropriate that it should contain a provision requiring the dangerous nature of the goods to be specified.

78. Mr. TARKO (Austria) said that under the Finnish proposal the operator must be informed about the dangerous nature of the goods, but no provision was made for a sanction if he was not so informed. It would therefore be preferable to stick to the present text.

79. Mr. OCHIAI (Japan) asked who would have the duty of informing the operator about the dangerous character of the goods. He supported the present text.

80. Mr. SOLIMAN (Egypt) expressed his support for the Finnish proposal.

81. Mr. ZHAO Chengbi (China) said that he had abstained in the vote on the Belgian proposal. The aim of article 9 should be to make the operator take all necessary precautions when handling dangerous goods. The Finnish proposal made it necessary to inform the operator and draw his attention to the dangerous character of the goods. Even if dangerous goods were so marked, the operator might not pay attention or might not realize the nature of the danger or might be unfamiliar with certain special categories of dangerous goods. He therefore supported the proposal, but suggested that it be forwarded to the Drafting Committee for further improvement.

82. Mr. RUSTAND (Sweden) agreed with the representatives of the USSR and Austria concerning the discrepancy between the obligation placed upon the person handing over the goods and the lack of sanction to back up that obligation. In the Hamburg Rules, for instance, the shipper was liable to the carrier. Since it was difficult to introduce an obligation without also introducing a sanction, he preferred to stick to the basic text.

83. He also drew attention to the notion of "property" in subparagraph (a), because it was not clear to him whether the danger to property referred to included danger to the environment. Other recent conventions had tried to make explicit mention of danger to the environment rather than include it under the notion of "property". It was a question of drafting rather than of substance to which he hoped attention would be given.

84. The CHAIRMAN said that, in his personal view, the term "property" as used in the present Convention covered the environment and its protection.

85. Mr. SAFARIAN NEMATABAD (Islamic Republic of Iran) said that he supported the idea contained in the Finnish proposal, but found it difficult to see how the compulsory element could be fitted in. He agreed with the representative of Japan that the person who should inform the operator had not been clearly identified.

86. Mr. RAQ (India) said that there appeared to be certain misconceptions regarding the scope of the proposal. At the beginning of the discussion, the representative of Italy had drawn attention to the important fact that if the dangerous goods were marked in accordance with the law applicable in the country where they were to be delivered, the present provision did not apply. In other words, the aims behind the proposal were already taken care of, albeit indirectly, in the present provision. The Finnish proposal was incomplete in certain respects since it did not deal with the duty of the customer or person handing dangerous goods over to the operator to mark, label, etc., the goods concerned. As that was covered in article 9 as it stood, no amendment was needed.

87. Mr. SCHROCK (Germany) expressed his agreement with the representative of India.

88. Mr. NAOR (Israel) said that his delegation supported the Finnish proposal. He suggested that, to clarify matters, the information must be given to the operator by the person referred to as having been required to do so in article 9 (b).

89. The CHAIRMAN invited the Committee to vote on the Finnish delegation's proposal (A/CONF.152/C.1/L.55).

90. There were 15 votes in favour, 15 against and 4 abstentions.

91. The proposal was not adopted.

The meeting rose at 12.35 p.m.